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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-582

STATE OF NORTH CAROLINA

Petitioner,

v.

RUBEN SONNY CONNLEY

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

RUFUS L. EDMISTEN
Attorney General of
North Carolina

LESTER V. CHALMERS, JR.
Special Deputy Attorney General

DONALD W. STEPHENS
Assistant Attorney General

North Carolina Department
of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-2011

Counsel for Petitioner

DI CESARE - PRINTING / Washington, D.C. 20006 / (202) 331-8101

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

The Petitioner, State of North Carolina, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of North Carolina entered in this proceeding on July 14, 1978.

OPINIONS BELOW

The opinion of the North Carolina Supreme Court granting a new trial, Appendix A hereto, is reported at 295 N.C. 327, ___ S.E. 2d ___ (1978).

JURISDICTION

The decision of the Supreme Court of the State of North Carolina, Appendix A hereto, was filed on July 14, 1978, and this petition for a writ of certiorari was filed within 90 days of that date, pursuant to Rule 22(1). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

Interpreting this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), in the absence of an express oral or express written waiver of right to counsel prior to questioning, does *Miranda* allow a finding of an *implied* waiver of right to counsel from the surrounding facts and circumstances of the case where the suspect has been fully advised of his constitutional rights before making voluntary incriminating statements in response to questioning.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V which provides:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law..."

United States Constitution, Amendment XIV, Section 1:

> "...[N]or shall any State deprive any person of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

A. GENERAL BACKGROUND

Ruben Sonny Connley was convicted upon trial by jury in Granville County Superior Court, North Carolina for the offense of first degree murder [N.C. Gen. Stat. § 14-17] at the 14 March 1977 special criminal session. From a judgment imposing a mandatory sentence of life imprisonment, the defendant appealed to the North Carolina Supreme Court. That Court reversed this conviction and ordered a new trial, finding defendant's confession, which was admitted into evidence against him, did not comply with the North Carolina Supreme Court's interpretation of *Miranda* v. *Arizona, supra.*

B. FACTS MATERIAL TO THE QUESTION PRESENTED

The State's evidence tended to show that the defendant, Ruben Sonny Connley, left Atlanta, Georgia by automobile on November 14, 1976 and drove alone to Baltimore, Maryland for the purpose of *eluding people* whom he perceived to be following him. Prior to his departure from Atlanta, Georgia, Connley purchased a .38 caliber revolver to protect himself from his pursuers. After his arrival in Baltimore and a short visit with friends, Connley began his return trip to Atlanta during which he observed an unmarked Virginia State Police car on Interstate Highway No. 85,

near McKinney, Virginia, at approximately 11:00 p.m. that evening. Connley turned his vehicle around and headed north in the southbound lane to stop the trooper and inform this officer that he, Connley, was being pursued by people. When Connley approached the Virginia State patrol vehicle, driven by Patrolman Garland W. Fisher, Connley got out of his car and told the trooper, "I was fixing to come to get you to lock me up." In the course of the conversation which thereafter transpired between Connley and Trooper Fisher, defendant was asked to surrender his gun, but refused. A struggle ensued; Trooper Fisher was wounded, disarmed, forced into his patrol vehicle and directed to drive southward toward Atlanta. Connley permitted Trooper Fisher to make three separate radio calls to his dispatcher relating these events and warning against any interference with their progress to Atlanta. One such radio transmission from Trooper Fisher said: "...the man in the car with me has two pistols on me. He said if we are interfered with in any way, or if he is hit, that he will kill me." Patrolman Fisher's vehicle was followed at a distance by officers of various law enforcement agencies as it passed through Virginia and into North Carolina. As this vehicle, driven by Trooper Fisher, proceeded through North Carolina on Interstate Highway No. 85, it encountered a roadblock created by the use of a tractor-trailer parked diagonally across the southbound lanes by officers of the North Carolina State Highway Patrol. As the vehicle in which Connley and Patrolman Fisher approached the roadblock and attempted to go around the tractor-trailer, gunfire erupted. The subsequent

exchange of gunfire between Connley and law enforcement officers on the scene resulted in the death of Patrolman Fisher and the wounding of Connley, such wounding rendering him unconscious at the scene. Expert medical and ballistics testimony established that the four fatal wounds to the body of Patrolman Fisher were fired from the .38 caliber revolver and other weapons in possession of the defendant at a range of from six inches or less, thereby causing the Trooper's death.

Connley was removed from the vehicle and taken by ambulance to Duke Medical Center where he was treated for his wounds and also, after Miranda warnings, was interviewed by Special Agent Victor Holdren of the Federal Bureau of Investigation. This interview took place between 4:00 and 5:00 a.m. on November 15, 1976 in the hospital emergency room. Agent Holdren ascertained from the attending physician, Dr. W. R. Belts, that Connley was being treated for a gunshot wound to the left chest area and to the right hand, but that Connley's condition was stable, that he had not received any medication to sedate him and that Connley was capable of talking to the agent. At the interview the Agent observed that Connley was alert and responded to questions in a normal, rational way. After reading and explaining the Miranda rights by use of a printed form and inquiring if the defendant understood these rights, Agent Holdren was informed by Connley, "I know what it says and I understand, but I'm not going to sign it." Connley thereafter voluntarily answered questions and made statements, the

substance of which Special Agent Holdren related to the jury, including his explanation of the circumstances which prompted his trip from Atlanta to Baltimore on November 14, 1976, the details of his initial encounter with Trooper Fisher, details of the ride from McKinney, Virginia to North Carolina, and details of his actions at the North Carolina roadblock which included incriminating admissions that he fired both his .38 pistol and Trooper Fisher's weapon during the exchange of gunfire.

The defendant offered avidence through the testimony of two psychiatrists that he suffered from a paranoid mental condition and was subject to periods of hallucinations and delusions, but that he knew the difference between right and wrong at the time of the offense.

The inclusion of defendant's incriminating statements to FBI Special Agent Holdren was assigned as error by defendant upon his appeal from the jury verdict of guilty to the first degree murder of Trooper Fisher and the mandatory life sentence of imprisonment imposed thereafter. It was this assigned error for which the North Carolina Supreme Court reversed, ordering a new trial. The North Carolina Supreme Court interprets *Miranda* v. *Arizona, supra,* as requiring either an express written or an express oral waiver of counsel. Citing its own prior opinions, *State* v. *Blackmon,* 284 N.C. 1, 199 S.E. 2d 431 (1973), *State* v. *Butler,* 295 N.C. 250, 244 S.E. 2d 410 (1978) [State's petition for certiorari to U.S. Supreme Court now pending in *Butler*

is 78-354 filed 30 August 1978] and other cases, the Court held that a correct interpretation of *Miranda* requires a specific express oral or written waiver of counsel prior to interrogation in order to permit the inclusion of defendant's subsequent incriminating statements into evidence. Inclusion of such, absent this express waiver, was prejudicial error requiring for Connley a new trial the Court held. (See Appendix A attached hereto).

C. MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED

The federal question presented herein was originally raised by the Court, *ex mero motu,* to inquire into the admissibility of any statement which Connley made to Special Agent Victor Holdren of the Federal Bureau of Investigation at the time of his questioning in the emergency room of Duke University Medical Center during the early morning hours of November 15, 1976. When Agent Holdren took the witness stand, the trial court heard his testimony on *voir dire* out of the presence of the jury and thereafter made the following findings of fact and conclusions of law:

> "THE COURT: This cause coming on to be heard and being heard before the undersigned, Judge Presiding, at the Special Criminal Session of the Granville County Superior Court beginning March 14, 1977, and it appearing to the Court and the Court finding the following facts to be true for the purpose of this hearing.

That during the early morning hours of March [*sic, November*] 15, 1976, at approximately 4:05 a.m., the defendant Sonny Ruben Connley, was in the Duke Hospital at Durham located on a treatment table at which time, FBI Agent Victor Holdren went to the hospital and talked with one of Connley's attending physicians; that at this time, he was advised by the doctor that Connley was not under medication and sedation, and that he could be talked with concerning the matters that occurred at the previous evening and early morning hours.

That the officer then went to the room, identified himself and an additional officer who was in his company. At this time, he had in his possession a form entitled, 'Interrogation—Advice of Rights, Your Rights,' which he displayed to the Defendant, Connley, for such period of time and at such a location as to permit him to read the form.

That after so positioning the paper for this period of time, the officer did then read to the defendant the following form: 'Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can and will be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. If you cannot afford a lawyer, one

will be appointed for you before any questioning, if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.'

After which, he read the following Waiver of Rights, which were part of the same form: 'I have this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.'

After having read the entire form as recited by the Court, the officer then asked the defendant if he knew and understood his rights; that the defendant then replied, 'I know what it says and I understand, but I'm not going to sign it;' that thereafter the defendant did proceed to answer certain questions and make a statement to Officer Holdren.

That the statement made to Officer Holdren was made in response to questions asked, and that the responses were in keeping with the questions asked and for although the

defendant from time to time refused to respond, nevertheless, the responses given were appropriate.

That at no time in the officer's presence has anyone threatened the defendant in any way, promised him anything or held out any hope of reward, and that the defendant was not in any manner coerced.

That he appeared to the officer to be alert at the time subject to the limitations of his lying on his back on a treatment table and bandages and appropriate dress, but other than these, that he looked the same today as he did then; that while the defendant did not specifically make the affirmative statement that he did not have a desire, that he did not desire to have an attorney present, he nevertheless was fully advised of his rights to have an attorney present and knew and understood his right to have an attorney present before he answered any questions put to him by Officer Holdren.

And the Court finds as a fact from the totality of these surrounding circumstances that he did in fact waive his right to an attorney and his other constitutional rights as explained by Officer Holdren.

Based upon the foregoing findings of fact, the Court concludes as a matter of law that the defendant did knowingly, understandingly,

voluntarily and without threat, promises, coercion of any kind willingly and intelligently and intentionally answered questions asked him by Officer Holdren, and that the statement in fact made by the defendant to Officer Holdren was knowingly, voluntarily, and understandingly made with a full understanding of his memoranda [*sic, Miranda*] and constitutional rights without threat of any kind, without pressure or coercion or promises; and that the statements made by the defendant to the officer should in fact and may in fact be admitted into evidence against him.

Based upon the foregoing findings of fact and conclusions of law, the Court orders that the statement made by the defendant to Officer Holdren be, and the same is hereby ordered admitted into evidence against him.

To each of the foregoing findings of fact, conclusions of law and to the order of the Court admitting the statement into evidence, the defendant in apt time objects and excepts.

Objection overruled.

EXCEPTION NO. 8"
(R. pp. 52-54)

The defendant's objection and exception to such ruling was appealed from his conviction to the North Carolina Supreme Court asserting as error the admission of his incriminating statements into evidence in violation of his Federal Constitutional rights. The North Carolina Supreme Court found the admission of such confession error and reversed, holding that federal law (*Miranda* v. *Arizona*) requires the prosecution to show that an express oral or written waiver of right to counsel was specifically made by a defendant before his incriminating statement can be used as evidence against him and that no waiver can be implied in the absence of such express specific waiver.

The defendant's incriminating comments included the statement: "I was shooting at the dude on top of the trailer and don't know if I shot the Trooper or not." He admitted firing the weapons he had in his possession, including his .38 caliber revolver and the Trooper's gun. In response to Agent Holdren's question would he have shot Fisher if he had been allowed to continue to Atlanta, the defendant replied, "No, I wouldn't have. I'm sorry, no."

The Federal Question presented herein has thus been properly raised and appropriately preserved at all stages of this case. The question presented is identical to that presented in *State* v. *Butler,* 295 N.C. 250, 244 S.E. 2d 410 (1978) decided on June 6, 1978 by the North Carolina Supreme Court granting Butler a new trial on the same grounds. The State has petitioned this Court for a writ of certiorari in the *Butler* case, filing such petition on 30 August, 1978 [78-354].

REASONS FOR GRANTING THE WRIT

A. The Supreme Court of North Carolina has decided an important question of Federal Constitutional law in a manner in conflict with the applicable decisions of this Court.

In establishing "concrete constitutional guidelines for law enforcement agencies and courts to follow," this Court's *Miranda* decision dictated that:

> "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. *If however, he indicates in any manner* and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." [384 U.S. at 444 and 445] (Emphasis added)

The Court goes on further to say:

> "Once warnings have been given, the subsequent procedure is clear. *If the individual indicates in any manner* at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. . . . If the individual states that he wants an

attorney, the interrogation must cease until an attorney is present." [384 U.S. at 474 (Emphasis added)]

The Court Concludes:

"Our decision is not intended to hamper the traditional function of police officers in investigating crime....

....

Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." [384 U.S. at 478]

This Court in its *Miranda* decision clearly indicates that once a suspect is fully appraised of his Constitutional rights and acknowledges an understanding of such rights, then the police officer, in the proper performance of his duty, may elicit voluntary statements from the suspect, unless "the individual indicates in any manner" that he wishes to remain silent or that he wishes to speak with counsel. This Court has never interpreted the Fifth and Fourteenth Amendments to require a prosecutor to show a specific affirmative oral or written waiver of the right to counsel before an incriminating statement voluntarily made by the fully warned suspect could be used as evidence against him. Neither the *Miranda* decision nor any other decision of this Court has ever imposed such a

requirement on prosecutors and law enforcement agencies attempting to carry out their proper functions within the guidelines of federal law.

In *Brewer* v. *Williams,* 430 U.S. 387, 51 L. Ed. 2d 424, 97 S. Ct. 1232 (1977) this Court did not extend the principles of *Miranda* to the extent that the North Carolina Supreme Court has by its pronouncements in this case. In *Williams* this Court found that there was no evidence to support a waiver, emphasizing that *Williams* had in fact consulted with counsel and indicated he was not desirous of giving any information in the absence of his attorney. Under the principles of *Miranda,* ["It the individual indicates in any manner,..."] the confession in *Williams* had to be suppressed. However, this Court did not take the opportunity to establish a rule which would preclude the finding of an implied waiver in appropriate cases.

In *State of Oregon* v. *Hass,* 420 U.S. 714, 43 L. Ed. 2d 570, 95 S. Ct. 1215 (1975) this Court indicated that "a State may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." [420 U.S. at 719]

This Court has specifically refrained from imposing the restrictions under federal law which the North Carolina Supreme Court has seen fit to impose. Thus the decision of the North Carolina Supreme Court in this case is in direct conflict with that of this Court.

Presently pending before this Court on writ of certiorari is a similar question interpreting *Miranda* as applied to a juvenile suspected of murder who, during the course of custodial interrogation, waives counsel but requests the presence of his juvenile probation officer. [*Fare* v. *Michael C.*, reported as *In Re Michael*, 21 Cal. 3rd 471, 579 P. 2d 7 (1978), State's petition for *certiorari* filed in the United States Supreme Court on August 28, 1978 as 78-334.] Mr. Justice Rehnquist writing an *In-Chambers* opinion on the application of the State of California to stay enforcement of the judgment of the California Supreme Court adverse to the state which required exclusion of the juvenile's confession [*In Re Michael*, 21 Cal. 3rd 471 (1978)] made the following observations:

> "Ultimately, therefore, my decision to stay enforcement of the California Supreme Court's order must rest on my assessment of the likelihood of four Justices voting to grant certiorari and of the petitioner prevailing on the merits. This Court is tendered many opportunities by unsuccessful prosecutors and unsuccessful defendants to review rulings predicated on *Miranda* and related cases, and, as with many issues that recur in petitions before this Court, we decline most such tenders. But some pattern has developed in the handling of *Miranda* issues that, I think, portends a substantial likelihood of success for the instant petition.

Miranda v. *Arizona* was decided by a closely divided Court in 1966. While the rigidity of the prophylactic rules was a principal weakness in the view of dissenters and critics outside the Court, its supporters saw that rigidity as the strength of the decision. It afforded police and courts clear guidance on the manner in which to conduct a custodial investigation: if it was rigid, it was also precise. But this core virtue of *Miranda* would be eviscerated if the prophylactic rules were freely augmented by other courts under the guise of 'interpreting' *Miranda*, particularly if their decisions evinced no principled limitations. Sensitive to this tension, and to the substantial burden which the original *Miranda* rules have placed on local law enforcement efforts, this Court has been consistently reluctant to extend *Miranda* or to extend in any way its strictures on law enforcement agencies. I think this reluctance is shown by our decisions reviewing state court interpretations of *Miranda*. As we noted in *Oregon* v. *Hass*, 420 U.S. 714, 719 (1975), 'a State may not impose . . . greater [*Miranda*] restrictions as a matter of federal constitutional law when this court specifically refrains from imposing them.'

In *Michigan* v. *Tucker*, 417 U.S. 433 (1974), we overturned a federal habeas corpus ruling that all evidence proving to be the fruit

of statements made without full *Miranda* warnings must be excluded at the subsequent state criminal trial. We overruled a state supreme court in *Oregon* v. *Hass, supra;* we held that a statement was admissible for purposes of impeachment even though it was given after the defendant indicated a desire to telephone an attorney. This Court has also recently rejected contentions that a confession was inadmissible after a reiterated *Miranda* warning if some hours earlier the defendant had indicated he did not want to discuss a different charge. *Michigan* v. *Mosley,* 423 U.S. 96 (1975). These are not to suggest that refusals to extend *Miranda* always please prosecutors, see *Brown* v. *Illinois,* 422 U.S. 590 (1975), or that this Court has shunned all logical developments of that opinion, see *Doyle* v. *Ohio,* 426 U.S. 610 (1976). But the overall thrust of these cases represents an effort to contain *Miranda* to the express terms and logic of the original opinion.

In our most recent pronouncement on the scope of *Miranda,* we found that the Oregon Supreme Court's expansive definition of 'custodial interrogation' read *Miranda* too broadly. *Oregon* v. *Mathiason,* 429 U.S. 492 (1977). Our reason for so ruling is probably best encapsulated in an observation we made in a similar context, 'such an extension of the *Miranda* requirements would cut this Court's

holding in that case completely loose from its own explicitly stated rationale.' *Beckwith* v. *United States,* 425 U.S. 341, 345 (1976). I think the decision of the California Supreme Court also risks cutting *Miranda* loose from its doctrinal moorings. The special status given legal counsel in *Miranda's* prophylactic rules is related to the traditional role of an attorney as expositor of legal rights and their proper invocation. He is also the principal bulwark between the individual and the state prosecutorial and adjudicative system. A probation officer simply does not have the same relationship to the accused and to the system that confronts the accused, and I believe this fact would lead four Justices of this Court to grant the State's petition for certiorari in this case.

The request for stay of the judgment of the California Supreme Court pending consideration of a timely petition for certiorari by the State of California is accordingly granted, to remain in effect until disposition of the petition for certiorari. If the petition is granted, this stay is to remain in effect until this Court decides the case or until this Court otherwise orders."

OPINION ISSUED 28 JULY 1978 AND REPORTED AT 23 Cr L 4139 (AUGUST 16, 1978).

[The same question is also pending before this Court in *State* v. *Butler,* 295 N.C. 250, 244 S.E. 2d 410 (1978), State's Petition for Certiorari filed in the U.S. Supreme Court on 30 August, 1978 as 78-354.]

In order to guide the minds and actions of judges, prosecutors and law enforcement officers caught in the conflict of interpreting the perimeters, limitations, and requirements of *Miranda,* and in order to insure that the federal law of the land is equally applied no more or less harshly or evenly in any one state as opposed to another, this conflict merits resolution by this Court.

B. The Supreme Court of North Carolina has decided an important question of Federal Constitutional law in a manner contrary to that of the Federal Circuit Courts and that of the Supreme Courts and Courts of Appeal of other states.

The federal circuit courts have consistently interpreted *Miranda's* provisions regarding waiver indicating that to constitute waiver of the right to remain silent or right to counsel at custodial interrogation, an express statement that the accused does not want a lawyer or that he waives his right to remain silent is not required; what the prosecution must show is that the accused was effectively advised of his rights and that he voluntarily, intelligently and understandingly declined to exercise them by word or by conduct, viewing the totality of the circumstances. The following Circuits properly recognize the doctrine of implied waiver by

interpreting federal law as requiring no mandatory showing of a specific express affirmative oral or written waiver of counsel by the defendant in order to introduce his statement into evidence: First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth and D.C. Federal Circuit Courts of Appeal.

Blackmon v. *Blackledge,* 541 F. 2d 1070 (4th Cir. 1976) emphasizes the conflict between the North Carolina Supreme Court's interpretation of *Miranda* and the federal circuit court of this jurisdiction. Defendant Johnny James Blackmon was convicted during the March 29, 1971 Term of the Superior Court of Stanly County, North Carolina for the offense of first degree murder. The jury making no recommendation for life imprisonment, the death penalty was imposed and defendant appealed. One of the errors assigned on appeal was admission into evidence of defendant's confession. The trial court on *voir dire* had found that the defendant at the time of his arrest was fully warned of his constitutional rights under *Miranda,* that defendant "did not request . . . the presence of an attorney," that he stated "he understood his rights," and that incriminating statements made thereafter were admissible. The North Carolina Supreme Court ruled it was error for the trial judge to allow into evidence such statement because there was no showing as required by federal law, as that court interpreted *Miranda,* that the defendant had made a specific affirmative oral or written waiver of counsel, rendering the inclusion of such evidence prejudicial error. [*State* v. *Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971)] On retrial the

defendant was again convicted during the 28 August 1972 session of Superior Court in Union County, North Carolina. The confession was again offered and received into evidence. The *voir dire* testimony showed that the incriminating statements which defendant made were made in an interrogation room in the presence of police officers when defendant was confronted by a co-defendant who accused the defendant of having shot the victim. The incriminating statements resulting from the exchange between these two suspects were admitted into evidence against Blackmon. When the co-defendant had left the room and the Sheriff asked defendant, "Do you care to make any further statement?", defendant responded, "Well, I'm just going to tell you how it was." His subsequent incriminating narrative was also admitted into evidence. On this second appeal the North Carolina Supreme Court in reviewing this same confession again said, "[t]hese facts, however, are not sufficient to constitute a waiver of counsel. *There is neither evidence nor findings of fact to show that defendant expressly waived his right to counsel, either in writing or orally, within the meaning of Miranda on which our decision* in *State* v. *Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971), *is based.*" [*State* v. *Blackmon,* 284 N.C. 1, 9, 199 S.E. 2d 431, 437, (1973) (Emphasis added)]. However, the court thereafter held the evidence admissible on the theory that such statements were not the result of an interrogation and were more in the nature of volunteered information. [*State* v. *Blackmon,* 284 N.C. at 12] The conviction was affirmed and case remanded for imposition of a life sentence. Blackmon

thereafter proceeded by writ of habeas corpus to the Federal District Court for the Western District of North Carolina challenging his conviction through the use of such confession in violation of his federal constitutional rights. The District Court granted the writ, [*Blackmon* v. *Blackledge,* 396 F.Supp. 296 (W.D.N.C. 1975)], but the Circuit Court of Appeals reversed, finding under the facts as previously described that there had been a compliance with *Miranda* and that Blackmon had waived counsel, stating that after proper warnings "...a suspect's submission to questioning without objection and without requesting a lawyer is clearly a waiver of his right to counsel..." [541 F. 2d at 1072].

The North Carolina Supreme Court's opinions in these two *Blackmon* cases form the basis for their decisions in *Butler, supra* [State's petition for certiorari filed August 30, 1978 as 78-354 in the United States Supreme Court] and in *Connley.* These opinions clearly focus the conflict in interpretation of federal law that exists in this jurisdiction and which requires immediate resolution.

In *United States* v. *Montos,* 421 F. 2d 215 (5th Cir. 1970) the court faced the question of the admissibility of defendant postal employee's confession to mail theft made to a federal postal inspector after proper *Miranda* warnings had been given, but defendant had made no specific verbal or written waiver of counsel. In finding no error by the admission of such evidence the court stated, "An express statement that the individual does not want a lawyer is not required, however, to show that

the individual waived his right to have one present. *See Bond* v. *United States,* 397 F. 2d 162, 165 (10th Cir. 1968). All the prosecution must show is that the defendant was effectively advised of his rights and that he then intelligently and understandingly declined to exercise them. *See Carnley* v. *Cochran,* 369 U.S. 506, 516, 82 S. Ct. 884, 890, 8 L. Ed. 2d 70 (1962)." [421 F. 2d at 224]. Thus the court's premise of implied waiver is based on its interpretation of federal law as explained in *Carnley* v. *Cochran, supra,* decided by this court in 1962 and which continues to give guidance in this area of federal law.

The facts of other federal cases in the remaining circuits recognizing this implied waiver concept are similar to those set out in *Montos, supra* where a defendant, after proper warnings and an acknowledgment of an understanding of such rights, begins to speak without first making a specific express oral or written waiver of counsel.

See: *U.S.* v. *Speaks,* 453 F. 2d 966 (1st Cir. 1971);
U.S. v. *Boston,* 508 F. 2d 1171 (2nd Cir. 1974);
U.S. v. *Stuckey,* 441 F. 2d 1104 (3rd Cir.), cert. denied 404 U.S. 841 (1971);
U.S. v. *Ruth,* 394 F. 2d 134 (3rd Cir.) cert. denied 393 U.S. 888 (1968);
U.S. v. *Thompson,* 417 F. 2d 196 (4th Cir.) cert. denied, 396 U.S. 1047 (1970);
U.S. v. *Cavallino,* 498 F. 2d 1200 (5th Cir. 1972);
U.S. v. *Montos,* 421 F. 2d 215 (5th Cir.) cert. denied 397 U.S. 1022 (1970);

U.S. v. *Ganter,* 436 F. 2d 364 (7th Cir. 1970);
Hughes v. *Swenson,* 452 F. 2d 866 (8th Cir. 1971);
U.S. v. *Marchildon,* 519 F. 2d 337 (8th Cir. 1975);
U.S. v. *Moreno-Lopez,* 466 F. 2d 1205 (9th Cir. 1972);
U.S. v. *Hilliken,* 436 F. 2d 101 (9th Cir. 1970);
Bond v. *U.S.,* 397 F. 2d 162 (10th Cir.), cert. denied 393 U.S. 1035 (1969);
U.S. v. *Cooper,* 499 F. 2d 1060 (D.C. Cir. 1974);
U.S. v. *McNeil,* 433 F. 2d 1109 (D.C. Cir. 1974); and
Mitchell v. *U.S.,* 434 F. 2d 483 (D.C. Cir.), cert. denied 400 U.S. 867 (1970).

From the foregoing it appears that the interpretation of the North Carolina Supreme Court of federal law is in complete conflict with all of the U.S. Circuit Courts of Appeal which have decided this issue, which is all such circuits except one. This clear and fundamental conflict requires immediate resolution.

An examination of the opinions of the Supreme Courts and Courts of Appeal of the various States within this United States interpreting this fundamental federal concept of law reveals that the issue of implied waiver of counsel during interrogation, presented in differing ways, has been addressed by the courts in a substantial number of states. In numerous opinions these courts have recognized from similar fact situations that federal constitutional law mandates no requirement that a properly warned defendant, who acknowledges an

understanding of such rights, specifically express either an oral or written waiver of counsel in order for the court to find a waiver implied from the totality of the circumstances surrounding the making of such statement.

The recent opinion of the Supreme Court of Georgia in *Peek* v. *State,* 239 Ga. 422, 238 S.E. 2d 12 (1977) is indicative of these state court decisions. Peek was convicted of two counts of murder and one of kidnapping. On appeal he assigned as error the admission of his confession to a sheriff who testified that defendant was informed of his constitutional rights before he made incriminating statements. The Georgia Supreme Court's interpretation of this federal question was explained as follows:

> "Although *Miranda* establishes that the accused has a constitutional right to the presence of an attorney during an in-custody interrogation, that right has been found to have been waived where the accused is informed of his rights, understands them, and then proceeds voluntarily to answer questions in the absence of counsel. See e.g., *Blackmon* v. *Blackledge,* 541 F. 2d 1070 (4th Cir. 1976); *United States* v. *James,* 528 F. 2d 999, 1019 (5th Cir. 1976); *United States* v. *Marchildon,* 519 F. 2d 337 (8th Cir. 1975); *United States* v. *Boston,* 508 F. 2d 1171 (2nd Cir. 1974). We do not construe the decision of the United States Supreme Court in *Brewer* v. *Williams,* 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977) as overruling the previously cited federal appellate court decisions." [239 S.E. 2d at 16]

For additional state cases recognizing the concept of implied waiver, see:

ALABAMA — *Sullivan* v. *State,* Ala. Cr. App. 351 So. 2d 659, cert. denied 351 So. 2d 665 (1977).

ARIZONA — *State* v. *Pineda,* 110 Ariz. 342, 519 P. 2d 41 (1974).

State ex rel Berger v. *Superior Court,* 109 Ariz. 506, 513 P. 2d 935 (1973).

CALIFORNIA — *People* v. *Johnson,* 75 Cal. Rptr. 401, 450 P. 2d 865 (reversed on other grounds) (1969).

People v. *Sam,* 77 Cal. Rptr. 804, 454 P. 2d 700 (1969).

COLORADO — *People* v. *Weaver,* 179 Colo. 331, 500 P. 2d 980 (1972).

Reed v. *People,* 171 Colo. 421, 467 P. 2d 809 (1970).

DELAWARE — *Aaron* v. *State,* Del. Supr. 275 A. 2d 791 (1971).

FLORIDA — *State* v. *Craig,* Fla. 237 So. 2d 737 (1970).

GEORGIA — *Peek* v. *State,* 239 Ga. 422, 238 S.E. 2d 12 (1977).

ILLINOIS — *People* v. *Brooks,* 51 Ill. 2d 156, 281 N.E. 2d 326 (1972).

MAINE — *State* v. *Hazelton,* Me. 330 A. 2d 919 (1975).

MARYLAND — *Miller* v. *State,* 251 Md. 362, 247 A. 2d 530 (1968).

Burton v. *State,* 7 Md. App. 671, 256 A. 2d 826 (1969).

MASSACHUSETTS — *Commonwealth* v. *Johnson,* Mass. App. 326 N.E. 2d 355 (1975).

Commonwealth v. *Murray,* 359 Mass. 541, 269 N.E. 2d 641 (1971).

MINNESOTA — *State* v. *Nelson,* ____ Minn. ____, 257 N.W. 2d 356 (1977).

MISSOURI — *State* v. *Williams,* Mo. Cr. App. 547 S.W. 2d 139 (1977).

State v. *Alewine,* Mo. 474 S.W. 2d 848 (1972).

State v. *Burnside,* Mo. 473 S.W. 2d 697 (1971).

OKLAHOMA — *Shirley* v. *State,* Okl. Cr. 520 P. 2d 701 (1974).

OREGON — *State* v. *Davidson,* 252 Ore. 617, 451 P. 2d 481 (1969).

PENNSYLVANIA — *Commonwealth* v. *Cost,* 238 Pa. Superior Ct. 591, 362 A. 2d 1027 (1976).

Commonwealth v. *Garnett,* 458 Pa. 4, 326 A. 2d 335 (1974).

TENNESSEE — *Parks* v. *State,* Tenn. Cr. App. 543 S.W. 2d 855 (1976).

Bowling v. *State,* Tenn. Cr. App. 458 S.W. 2d 639 (1970).

VIRGINIA — *Land* v. *Commonwealth,* 211 Va. 223, 176 S.E. 2d 586 (1970) (reversed on other grounds).

WASHINGTON — *State* v. *Young,* 89 Wash. 2d 613, 574 P. 2d 1171 (1978).

These State court opinions from courts which had addressed this issue clearly are in conflict with that of the North Carolina Supreme Court in the interpretation of federal constitutional rights which will be applied to defendants being tried in the various state courts and which will govern the admissibility of evidence in such courts. This fundamental conflict between the North Carolina Supreme Court and the appellate courts of its various sister states requires immediate resolution.

CONCLUSION

The decision of the North Carolina Supreme Court with respect to the use of evidence in the prosecution's case-in-chief in a North Carolina criminal state court proceeding under an interpretation solely of federal law is in complete conflict with the decisions of this Court, with the decisions of all the federal circuit courts of appeal which have ruled on the issue, and with a substantial number of state appellate courts. Such conflicting interpretation of federal law results in the uneven and unequal application of fundamental federal constitutional rights among the various state courts. In order to guide the minds and actions of judges, prosecutors, and law enforcement officers caught in this conflict, in order to insure that a State "not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them" [*Oregon* v. *Hass, supra,* 420 U.S. at 719], and to insure the equal interpretation and application of this important and fundamental issue of federal law in the various state and federal courts, a writ

of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of North Carolina herein.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

LESTER V. CHALMERS, JR.
Special Deputy
Attorney General

DONALD W. STEPHENS
Assistant Attorney General

Counsel for Petitioner, State of North Carolina

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-2011

APPENDIX A

IN THE
SUPREME COURT OF NORTH CAROLINA
SPRING TERM 1978

STATE OF NORTH CAROLINA

v.

RUBEN SONNY CONNLEY

No. 2 — Granville

On appeal pursuant to N.C. Gen. Stat. 7A-27(a) (Cum. Supp. 1977) from Thornburg, J., at the 14 March 1977 Special Criminal Session of Granville.

Defendant, Ruben Sonny Connley, was indicted under G.S. 15-144 (Replactment 1975) for the murder of Garland W. Fisher, a Virginia State patrolman.

At trial the State offered evidence which tended to show the following facts:

According to defendant's statement he left Atlanta, Georgia, on 14 November 1976 and drove his car to Baltimore, Maryland, for the purpose of eluding "people" whom he believed to be following him. Before leaving Atlanta, defendant purchased a .38 caliber revolver to protect himself from his pursuers. After spending approximately an hour visiting friends in Baltimore he left to return to Atlanta. When defendant observed an unmarked Virginia State Police car on Interstate Highway 85 near McKenney, Virginia, at about 11:00 p.m. that night, he turned his automobile around and headed north in the southbound lane,

intending to "stop the trooper because [defendant] was being pursued by people."

When defendant found the Virginia patrol car, driven by Patrolman Garland W. Fisher, he got out of his car and said to him, "I was fixing to come to get you to lock me up." In the course of their conversation defendant told Fisher about his gun, the .38 caliber revolver. Whereupon, the officer told defendant he would have to surrender his gun before defendant could get into the police car. To this statement defendant replied, "You keep yours and I will keep mine. When we get to jail, you can keep both of them." At this point Fisher attempted to wrest the gun from defendant, but in the insuing struggle, defendant removed the trooper's .38 caliber service revolver from its holster. As he did, the gun discharged, wounding Fisher in the shoulder. Defendant then forced him to get into his patrol car and drive it southward toward Atlanta. Sometime after 11:40 p.m. defendant permitted Fisher to radio his dispatcher three times in order to inform the authorities of his situation and to warn them against interfering with his progress to Atlanta.

As defendant and Fisher proceeded southward several patrolmen from Virginia and North Carolina, having been informed of Fisher's abduction by radio, gradually formed a small convoy behind his vehicle. Virginia Patrolman J. L. Crowder was immediately behind it. He was followed by Troopers W. H. Terry and F.H. Clark, Jr., of Virginia. Then came Sergeant Raines and Trooper J. M. Smith of Virginia, Patrolman C. G.

Todd of North Carolina and, finally, North Carolina Patrolman D. H. Matthews. After Patrolman Crowder first pulled his cruiser behind it, the "target vehicle" did not stop until it encountered a roadblock.

While the convoy was proceeding south North Carolina Patrolman R. P. Williams parked his patrol car about a mile north of N. C. Highway 56 on a wooded median strip so as to conceal it from southbound traffic. Then, with assistance from fellow officers D.M. Terrell and D.F. King, Williams created a roadblock by causing a tractor-trailer rig to park diagonally across the southbound lanes with its cab facing the median. Having blocked the road, the patrolmen took cover to await the arrival of Fisher's patrol car. Trooper Williams, armed with a State-issued 12 gauge shotgun, positioned himself behind the rear end of the trailer.

As Fisher's patrol car approached the roadblock it slowly pulled onto the right-hand shoulder as if to pass around the truck. When the approaching car came within 25 feet of the rear of the trailer, Williams raised his shotgun and fired into the center of its windshield. The Virginia patrol car stopped within 15 feet of Williams, who stepped forward to examine it. Gunfire immediately erupted from inside the vehicle; several witnesses heard from four to six shots emanate from Fisher's car and saw muzzle flashes near the middle of the seat. Williams again "took aim and fired through the left side of the vehicle attempting to shoot into the back seat where it appeared to [him] the gunshots came from." Williams testified that the passenger, whom he

had first seen seated by the driver, was no longer in view. The officer next fired through the windshield just to the left of center and then, from a crouching position, fired from the hip, attempting to shoot into the back door. Thereafter, he retreated behind Sergeant Bailey's patrol car, which had been driven past the Fisher vehicle and stopped near the truck on the right-hand shoulder of the southbound lanes of I-85.

Contemporaneously with the first exchange of gunfire, the patrolmen in the convoy pulled their vehicles into positions near Fisher's unmarked patrol car and assumed vantage points behind them from which to shoot. After Patrolman Williams returned to cover, Sergeant Bailey used his public address system to direct the other patrolmen to shoot the tires on the Fisher automobile. After the tires were thus deflated, the officers held their fire while Patrolman Matthews crawled from his car to the back of Fisher's automobile and attempted to look through the rear window. It was too dark to see inside; so Matthews returned to his car, drove past Fisher's automobile, and then made a U-turn so as to project his headlights into it.

The headlights revealed the man behind the wheel to be a white male. When he did not move, Matthews crawled to the door and observed that the man wore the arm patch of a trooper. He had a gaping hole in his left cheek. Matthews then shone his flashlight inside the car and saw a black male, later identified as Ruben Sonny Connley, kneeling or squatting on the front floorboard on the passenger's side. When the black man pointed a

revolver toward him Matthews dropped to the ground and crawled back to his vehicle. Using his public address system Matthews informed Sergeant Bailey that the driver-trooper appeared dead, but that the passenger was alive and armed.

Matthews volunteered to get the armed man out. After extinguishing his headlights, he crawled to within 20 feet of the passenger's side of Fisher's car and called to the black man to come out with his hands up. Receiving no response, Matthews moved to within 10 feet of the door, drew his .357 Magnum Colt, and fired six rounds into the door in a shot group which covered the man's position on the floorboard.

After reloading his pistol, Matthews raised his flashlight and checked the back seat of the vehicle. It was empty. He then peered into the front of the car and saw the defendant lying unconscious, the trunk of his body hunched onto the seat. In his right hand defendant grasped a shiny .38 caliber pistol; a .22 caliber pistol lay underneath the heel of the same hand. Matthews reached in through the shattered window on the passenger's side and removed these weapons as Sergeant Bailey and Trooper Todd came up behind him. Officers Bailey and Todd pulled the defendant from the car and removed a cocked and loaded .38 caliber blue-steel revolver from his person. This gun, which was later sent to the SBI lab in Raleigh for examination, was placed with the other two. Other patrolmen approached the car to rended Trooper Fisher aid but could find no pulse in his body.

Defendant and Fisher were taken by ambulance to the emergency room of Duke Medical Center in Durham. Later, Trooper Fisher's body was removed to Memorial Hospital in Chapel Hill where it was examined by the Chief Medical Examiner of North Carolina.

Dr. Wilton M. Reavis, Jr., a forensic pathologist on the staff of the Chief Medical Examiner, gave expert testimony based on the autopsy he had performed on Fisher's body. It was Dr. Reavis's opinion that the trooper had sustained at least 14 gunshot wounds. Any one of four of these, wounds No. 4, 5, 11 and 12, could have been fatal. Wound No. 4 resulted from a projectile which entered Fisher's right side, passed upward through the body at an angle of approximately 45 degrees, and exited the back near the left armpit. The projectile causing wound No. 5 entered slightly above Fisher's waistline on his right side, traveled upward at an angle of approximately 45 degrees and lodged in the back just beneath the neck. After its removal this bullet, State's Exhibit No. 17, was turned over to the SBI. The gunshot causing wound No. 11 entered on the right side of Patrolman Fisher's neck and came out on his left cheek just below the eye. The point of entry hole of wound No. 11, and the bullets causing these two wounds apparently exited the body at the same place. A small metal fragment, State's Exhibit 19, was recovered from entry wound No. 12 and given to SBI agents.

Numerous lead cases, bullet fragments, and spent cartridges collected by SBI Special Agent Douglas Branch from various locations in and around Fisher's

unmarked car were submitted to Examiner Stephen T. Carpenter, an expert in firearm identification employed by the SBI. Mr. Carpenter compared these materials, along with the fragments received from Dr. Reavis, against test items fired from three guns: (1) Patrolman Matthews' .357 Magnum Colt (State's Exhibit 5); (2) the R.B. Industries, Model R.J. 31, .38 caliber revolver with a four-inch barrel removed from defendant's person by Sergeant Bailey (State's Exhibit No. 6); and (3) the Smith & Wesson, Model 10-5, .38 caliber special revolver with a two-inch barrel taken from the defendant's hand by Trooper Matthews (State's Exhibit No. 7).

Based on his ballistic examinations, Mr. Carpenter testified that State's Exhibit No. 17 was the only projectile associated with one of the potentially lethal wounds which could be identified. In his opinion that bullet was fired from State's Exhibit No. 6, the R.G. 31, .38 caliber revolver taken from the defendant. Mr. Carpenter also analyzed the fabric of the jacket and shirt Trooper Fisher had been wearing when he was shot for traces of gunpowder and lead wipings. Based on the quantity of gunpowder and singed fabric detected, it was Carpenter's opinion that the holes in the Jacket which corresponded to the entry holes of the bullets inflicting fatal wounds Nos. 4 and 5 were caused by projectiles fired from a distance of six inches or less.

Other than immaterial testimony from a member of the ambulance crew, defendant's only evidence came from two psychiatrists, Dr. Billy W. Royal and Dr. Robert Harper. Dr. Royal, a member of the staff of Dorothea Dix

Hospital, first examined defendant on 3 February 1977. In his opinion, defendant was able to determine right from wrong at that time and, at the time of the trial, was "able to work with an attorney in terms of his defense" and to determine right from wrong. He had no opinion as to defendant's state of mind or whether defendant knew right from wrong at the time of the roadblock on the early morning of 15 November 1976. It was his opinion that defendant "has a paranoid personality and on occasions. . . might have frank delusions of hallucinations or be psychotic, and that it was a more or less chronic problem with the patient."

Dr. Robert Harper, a psychiatrist engaged in private practice in Raleigh, examined defendant for about two hours on 5 March 1977 after having studied the report of Dr. Royal's examination. In consequence, Dr. Harper formed the opinion (1) that defendant "suffered from paranoid schizophrenia," and was subject to delusions; (2) that "at the time defendant took the State Trooper, Garland W. Fisher, hostage. . . he knew it was wrong"; and (3) that "when confronted with the roadblock and attendant circumstances in the early morning hours of November 15, 1976. . . in spite of the fact that he was operating in a delusional state and was psychotic. . . [defendant] still knew the difference between right and wrong."

At the conclusion of counsel's arguments to the jury the court, in a bifurcated charge, submitted to the jury the following issues: (1) "Did the defendant kill the deceased?" and (2) "If so, was the defendant insane

when the killing occurred?" Upon concluding their deliberations the jury returned to the courtroom and announced their verdict that defendant killed Trooper Fisher, and that he was sane when he did it. The trial judge then explained the elements of first and second degree murder and instructed the jury to return either a verdict of guilty as to one of these offenses or a verdict of not guilty. The jury returned a verdict of guilty of first degree murder. Judge Thornburg sentenced defendant to life imprisonment and defendant appealed.

Additional facts will be stated in the opinion as necessary.

RUFUS EDMISTEN, Attorney General, and LESTER V. CHALMERS, JR., Special Deputy Attorney General, for the State.

HUGH M. CURRIN and JOHN H. PIKE for defendant appellant.

SHARP, CHIEF JUSTICE.

The assignments of error which defendant brings forward challenge the admission of certain portions of the State's evidence and the court's instructions to the jury.

We first consider defendant's contention that the trial judge committed prejudicial error by permitting State's witness Victor Holdren, a special agent with the Federal Bureau of Investigation, to testify about statements which defendant made to him in the

emergency room at Duke Medical Center between 4:00 and 5:00 a.m. on 15 November 1976. These statements, the substance of which Holdren related to the jury, included defendant's explanation of the circumstances which prompted his trip from Atlanta to Baltimore on 14 November 1976 and the details of his initial encounter with Trooper Fisher. Other statements made by defendant during this interview dealt with his ride from McKinney, Virginia, to the road block in North Carolina. Often quoting defendant verbatim, Agent Holdren recounted the substance of their conversation in his testimony to the jury. His testimony, except when summarized, is quoted below:

After defendant forced Fisher into his patrol car, defendant "told the trooper, 'Drive me to Atlanta, to the Atlanta Police Department and you are free.'" As they drove south defendant "allowed the trooper to use the radio and talk to his headquarters. Connley said he also talked on the radio but wouldn't tell me [Holdren] what the conversation was. He said they continued along Interstate 85 into North Carolina and came to a road block made up of a tractor-trailer across the road. He said he saw a number of people around the tractor-trailer and when the car stopped, the officers began shooting at their car and Trooper Fisher hit his arm and appeared to be trying to get out of the car. He [defendant] stated and I quote: 'I was shooting at the dude on top of the trailer and don't know if I shot the trooper or not.' I questioned him how many times he had fired his gun. He didn't recall but he said that he fired the guns he had in his possession which included his

gun, a .38 caliber revolver and the trooper's gun. He told me that his gun held 5 rounds of ammunition. He said everything went off pow, pow, pow, pow. At this point I was trying to determine if he had in fact shot Officer Fisher. I asked him if he had been allowed to continue to Atlanta, Georgia, would he have shot Fisher and he replied quote 'No, I wouldn't have. I'm sorry, no.' Mr. Connley said that during the drive from Virginia to the road block he and Trooper Fisher talked about life in general." At that point defendant terminated the conversation.

For reasons hereafter stated, defendant's assignment of error based upon his exceptions to the foregoing testimony must be sustained and a new trial granted.

When Special Agent Holdren was called as a witness and asked to recount his conversation with defendant, the court, *ex mero motu,* conducted a voir dire to determine the competency of that testimony. Only Agent Holdren testified; defendant offered no evidence. Upon completion of the voir dire the trial judge entered findings of fact upon which he concluded (1) that defendant waived his right to an attorney and his other consitutional rights as explained by Officer Holdren; (2) that defendant "knowingly, understandingly, and voluntarily... intelligently and intentionally answered" Holdren's questions; (3) that his statements were "made with a full understanding" of his constitutional rights; and (4) that these statements should be admitted into evidence against him.

On voir dire Holdren testified that he in no way coerced, or attempted to coerce, defendant into giving a statement; and that he made no threat or promise nor offered defendant any hope of reward. He "observed that Mr. Connley was alert and responded to questions in a normal, rational way." Holdren also told the court that before interviewing defendant he had spoken with Dr. W. R. Belts, one of defendant's attending physicians. Whereupon the State's attorney who was examining Agent Holdren propounded this question, "And what advice was given to you by Dr. Belts?"

The court overruled defendant's objection to the question and Holdren answered: "I was concerned about whether he [defendant] would be able to talk to me. He [Dr. Belts] described Mr. Connley as having been treated for a gunshot wound in the left chest area and the right hand and apparently what he thought was a bullet crease across his left knee. He said that Connley was in a stable condition; that he had received no medication to sedate him at all, and that he was alert and entirely capable of talking to me about this."

The admission of this testimony from Agent Holdren was, of course, error. It was unmistakable hearsay which was not within any exception to the general rule rendering hearsay incompetent and inadmissible evidence. Patently, this testimony was the only basis for the court's finding that "FBI Agent Victor Holdren went to the hospital and talked with one of Connley's attending physicians; that at this time, he was advised by the doctor that Connley was not under

medication and sedation, and that he could be talked with concerning the matters that occurred at the previous evening and early morning hours." It is equally obvious that the incompetent hearsay also supported the court's finding that defendant's answers to Holdren's questions were "knowingly, understandingly, voluntarily . . . willingly and intelligently and intentionally" made. The only other evidence tending to support that finding was Holdren's testimony that Connley "was alert and responded to the questions in a normal, rational way" when the agent talked to him.

"Unquestionably it is the rule in this jurisdiction that a judge's findings of fact will be reversed where it affirmatively appears they are based in whole or in part upon incompetent evidence. . . . However, 'in the absence of words or conduct indicating otherwise, the presumption is that the judge disregarded incompetent evidence in making his decision.'" State v. Davis, 290 N.C. 511, 541-42, 277 SE. 2d 97, 115 (1976). However, "this presumption is weakened when, over objection, the judge admits clearly incompetent evidence." *Ibid.* Defendant argues that the admission of this testimony requires a new trial. Because the record in this case reveals other error requiring a new trial, we need not determine whether the court's finding as to what Dr. Belts told Holdren with reference to defendant's condition constituted prejudicial error. **See** State v. Patterson, 288 N.C. 553, 566-67, 220 S.E. 2d 600, 610 (1975).

The trial court's conclusion that defendant waived his right to counsel was based upon the following factual findings:

"[T]hat while the defendant did not specifically make the affirmative statement that he did not have a desire, that he did not desire to have an attorney present, he nevertheless fully was advised of his rights to have an attorney present and knew and understood his right to have an attorney present and knew and understood his right to have an attorney present before he answered any questions put to him by Officer Holdren.

"And the Court finds as a fact from the totality of these surrounding circumstances that he did in fact waive his right to an attorney and his other constitutional rights. . . ."

On voir dire Holdren had testified that he approached defendant in the emergency room and asked him if he would talk. Defendant said he would, and Holdren informed defendant of his constitutional rights, reading the Miranda warning from a form entitled "Interrogation and Advice of Rights." This form also contained a "waiver of rights" section, under which was a line for defendant's signature. Additionally Holdren gave defendant a copy of the form and told him to read it for himself. The agent then asked defendant if he understood his constitutional rights and defendant replied, "I know what it says and I understand, but I'm not going to sign it." The record discloses no further statement by defendant bearing upon his rights. He did not sign the form.

Although a trial judge's findings of fact are binding upon appellate courts when supported by competent evidence, whether such evidence supports the findings and whether the findings themselves support the court's conclusions are questions of law reviewable on appeal. State v. Thompson, 287 N.C. 303, 214 S.E. 2d 742 (1975); State v. Pruitt, 286 N.C. 442, 212 S.E. 2d 92 (1975). The findings in this case, quoted above, are insufficient to support the conclusion that defendant waived his right to counsel. Defendant unequivocally refused to sign a waiver, and Holdren's testimony on voir dire fails to show a specific oral waiver. As this Court said in a recent case involving similar findings:

"Measured by *Miranda* standards it is apparent that the findings of fact are not supported by the voir dire testimony of Agent Martinez. Failure to request counsel is not synonymous with waiver. Nor is silence. . . . The trial judge erred in holding that since defendant had been fully informed and understood his right to the presence of counsel at the incustody interrogation and did not request a lawyer, his act in making the statement amounted to a waiver of counsel." State v. Butler, 295 N.C. _____, _____, 244 S.E. 2d 410, 413 (1978).

As we have frequently noted, the Supreme Court said in Miranda v. Arizona, 384 U.S. 436, 470, 16 L. Ed. 2d 694, 721 86 S. Ct. 1602, 1626 (1966), that a waiver must be explicit and cannot be presumed from silence:

"An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively

secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given. . . ."

In State v. Blackmon, 280 N.C. 42, 49-50, 185 S.E. 2d 123, 128 (1971), this Court ordered a new trial because there was no evidence that the defendant expressly waived his right to counsel. "Although the evidence at the *voir dire* is ample to support a finding that the defendant made the statements in question freely and voluntarily, having been fully advised of and having full understanding of his right to have an attorney present, the plain language of the *Miranda* decision above quoted in addition requires a waiver of right to counsel knowingly and intelligently made by defendant. '. . . [F]ailure to ask for a lawyer does not constitute a waiver.'" We reiterated this principle in Blackmon's second appeal, State v. Blackmon, 284 N.C. 1, 9-10, 199 S.E. 2d 431, 437 (1973), and have noted or applied it in other decisions. *See* State v. Lawson, 285 N.C. 320, 204 S.E. 2d 843 (1974); State v. Thacker, 281 N.C. 447, 189 S.E. 2d 145 (1972); State v. Turner, 281 N.C. 118, 187 S.E. 2d 750 (1972); State v. Hudson, 281 N.C. 100, 187 S.E. 2d 756 (1972), *cert. denied* 414 U.S. 1160.

Since defendant's statements were admitted in violation of his constitutional right to have counsel present at his in-custody interrogation, a new trial must be granted because we cannot say that there was no

reasonable possibility that the evidence complained of contributed to defendant's conviction. State v. Chapman, 386 U.S. 18, 17 L.Ed 2d 705, 87 S. Ct. 824 (1967); State v. Thacker, supra; State v. Hudson, supra; State v. Taylor, 280 N.C. 273, 185 S.E. 2d 677 (1972). The most hotly contested issue in this case was whether Fisher was killed by defendant or by the law enforcement officers who fired into the patrol car in attempting to rescue him. The import of Agent Holdren's testimony was that defendant first said he did not know whether he shot Fisher; that he later said he could have shot him; and that he finally said he was sorry, because he would not have shot Fisher had they been allowed to continue to Georgia. It cannot be denied that such a quasi confession by an accused would ordinarily make a profound impression upon the minds of the average juror. *See* State v. Blackmon, 280 N.C. 42, 50, 185 S.E. 2d 123, 128 (1971). Therefore the erroneous admission of defendant's in-custody statements entitles him to a new trial.

Of the remaining assignments of error only assignment No. 1 raises a question likely to recur at defendant's second trial. Notwithstanding, we note assignment No. 9, which is not an assertion of legal error; it is but a recurring plea to this Court to reverse the rule that a defendant pleading insanity has the burden of proving that at the time of the crime he lacked capacity to know the nature and quality of his act or to distinguish between right and wrong in relation to it. Defendant concedes that this test, known as the M'Naghten rule, has "existed in North Carolina for well

over a century." State v. Helms, 284 N.C. 508, 201 S.E. 2d 850 (1974). He argues, however, that the rule is "incommensurable" with present psychiatric thinking, "archaic and unyielding," and places an "insurmountable" burden upon a defendant. We again reject this argument.

In recent years we have repeatedly reaffirmed our adherence to the M'Naghten rule; we now do so again. Although the science of psychiatry has made great strides since *M'Naghten's Case,* in our view, the psychiatrists have offered nothing better than the standard it established. As Justice Huskins, speaking for the Court, said in State v. Helms, 284 N.C. 508, 514, 201 S.E. 2d 850, 854 (1975), "[T]he M'Naghten rule is constitutionally sound; and our adherence to it is based on reason and common sense." *Accord,* State v. Pagano, 294 N.C. 729, 242 S.E. 2d 825 (1978); State v. Willard, 292 N.C. 567, 234 S.E. 2d 587 (1977); State v. Harris, 290 N.C. 718, 228 S.E. 2d 424 (1976); State v. Taylor, 290 N.C. 220, 226 S.E. 2d 23 (1976); State v. Hammonds, 290 N.C. 1, 224 S.E. 2d 595 (1976).

Further, we again point out, as we did in State v. Caldwell, 293 N.C. 336, 237 S.E. 2d 742 (1977), that the decision in Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975) did not change our rule that the burden of proof with respect to insanity rests upon the defendant pleading it. *See* Patterson v. New York, 432 U.S. 197, 53 L.Ed. 2d 281, 97 S.Ct. 2319 (1977); State v. Pagano, supra; State v. Jones, 293 N.C. 413, 238 S.E. 2d 482 (1977).

Finally, we proceed to defendant's assignment No. 1, which challenges the admission of the testimony of two Virginia State Police Dispatchers, Thomas M. Richardson and Frances C. Houchins, dealing with radio transmissions they received from Trooper Fisher while on duty late in the evening of 14 November 1976 and the early morning hours of November 15th. Both dispatchers knew Fisher and had engaged in radio communications with him prior to November 14th.

Richardson testified that while on duty he received two transmissions before midnight from Trooper Fisher, who identified himself by his coded "batch" number of 1309. He also stated that he heard the substance of a third communication from Fisher which was received by Mrs. Houchins, who relieved Richardson at midnight. Mrs. Houchins testified that she received one communication from unit 1309 and identified the speaker as Patrolman Fisher. When the State sought to elicit from each dispatcher the substance of the broadcasts he or she had heard (three broadcasts for Richardson and one for Mrs. Houchins), defendant objected. The trial judge overruled defendant's general objection and admitted the following testimony pertaining to the content of the three communications.

1. Communication received by Richardson at 11:45 p.m., November 14, 1976:

"Q. And what did [Fisher] say to you at that time?

"A. His transmission was . . . 'I have a subject who now has me in his custody. He has my service

revolver. He wants me to take him to Atlanta, Georgia, and I am now on Interstate 85, ten miles south of McKenney. I have been shot once.'"

2. Communication received by Richardson at 11:52 p.m.:

"Q. Would you tell the court what G.W. Fisher told you on this occasion?

"A. His transmission was 1309. 'I am now escorting the subject to Atlanta Police Department.'"

3. Communication received by Houchins and heard by Richardson at 12:08 a.m., November 1976:

"Q. (To Richardson) And at approximately 12:08 a.m. on the morning of November 15, 1976, what if anything, did Patrolman G. W. Fisher say to you at that time?

"A. (By Richardson) He called in on his radio and Mrs. Houchins, the other dispatcher, was with him at this time. And his transmission was 1309. She said, 'Go ahead.' He said, 'The subject now has both pistols on me. If anybody or any officer hits him, he is going to kill me.'

"Q. (To Houchins) What, if anything, did [Fisher] say to you at 12:09 a.m. on the morning of November 15, 1976?

"A. (By Houchins) He called me, he said, '1309 to Richmond,' and I acknowledged him and then he said, 'Mrs. Houchins, the man in the car with me has two pistols on me. He said if we are

interfered with in any way, or if he is hit, that he will kill me.' I waited for him to continue and he repeated the same thing over."

Defendant contends that the trial court's admission of this testimony regarding the content of the broadcasts received from Patrolman Fisher constituted reversible error.

Radio communications, by analogy to telephone conversations, are governed by the rules of evidence regulating the admission of oral statements made during a face-to-face transaction, once the identity of the speakers is ascertained. *See* Everette v. D.O. Briggs Lumber Co., Inc. 250 N.C. 688, 110 S.E. 2d 288 (1959). That the radio messages received by Mr. Richardson and Mrs. Houchins were sufficiently identified as being those of the deceased is undisputed. Accordingly, this assignment of error may be analyzed in light of the general principles of evidence governing hearsay.

Evidence, whether oral or written, is hearsay (1) "when its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness by whom it is sought to produce it." State v. Deck, 285 N.C. 209, 213, 203 S.E. 2d 830, (1974). "Hearsay evidence, unless it falls within one of the recognized exceptions to the hearsay rule, is inadmissible." 1 Stansbury's North Carolina Evidence, § 138 (Brandis Rev. 1973). Indisputably, the content of the radio transmissions by Patrolman Fisher was hearsay; the evidence was offered to show (1) that the

trooper was being forced to drive to Atlanta and (2) that his armed abductor was threatening to kill him should a rescue be attempted. This testimony, however, falls within two well-established exceptions to the hearsay rule and was therefore properly admitted.

First, Fisher's entire report to the dispatchers—both the stark statement of his predicament and his repetition of defendant's threats—were admissible under the "*res gestae* concept." An excellent general statement of this concept appears in Underhill's Criminal Evidence §266, p. 664 (5th Ed. 1956), as follows:

"The rule of res gestae, under which it is said that all facts which are a part of the res gestae are admissible, is a rule determining the relevancy and not the character or probative force of the evidence. If the court determines that the fact offered is a part of the res gestae, it will be accepted, because, as it is said, that fact is then relevant.... Circumstances constituting a criminal transaction which is being investigated by the jury, and which are so interwoven with other circumstances and with the principal facts which are at issue that they cannot be very well separated from the principal facts without depriving the jury of proof which is necessary for it to have in order to reach a direct conclusion on the evidence, may be regarded as res gestae.

"These facts include declarations which grow out of the main fact, shed light upon it, and which are unpremeditated, spontaneous, and made at a time so near, either prior or subsequent to the main act, as to

exclude the idea of deliberation or fabrication. A statement made as part of res gestae does not narrate a past event, but it is the event speaking through the person and therefore is not excluded as hearsay, and precludes the idea of design."

The res gestae concept was the basis of decision in the following cases:

In Brown v. State, 249 Ala. 4, 31 So. 2d 681 (1946) the defendant shot and killed his brother-in-law, Wilkey, in front of the deceased's restaurant after considerable argument in and around the premises. During the course of the disturbance, Wilkey twice telephoned the sheriff and told him that two men armed with a shotgun were outside his place, cursing and threatening to kill him. On the second call he told the sheriff "to get on out here; they are going to kill me." Before the sheriff could get there the defendant did kill Wilkey. Defendant was convicted of murder. On his appeal to the Court of Appeals the conviction was vacated because the trial judge permitted the sheriff to testify about those conversations between the deceased and himself. Upon the State's appeal, the Alabama Supreme Court reversed the Court of Appeals, holding "that the conversation between the deceased and the sheriff superinduced by the menacing presence and threats by the defendant are within the res gestae of the killing, 'substantially contemporaneous with the main fact under consideration, and so closely connected with it as to illustrate its character.' (Citations omitted)" *Id.* at 7, 31 So. 2d at 682.

The case of Commonwealth v. Coleman, 458 Pa. 112, 326 A.2d 387, 74 A.L.R. 3d 954 (1974) is also illuminating. The evidence tended to show that at approximately 6:15 a.m. on 3 May 1971 the deceased telephoned her mother and, in an agitated voice, stated that defendant (her boyfriend) "would not let her leave the apartment, that he would hang up the phone, and that he was going to kill her." When the connection was broken at approximately 6:25 a.m. the girl's mother called the police, as she had been implored to do. At 6:35 a.m. policemen found the girl in her apartment, dead of multiple stab wounds. Defendant appealed his conviction of murder, contending that the trial judge had erred in permitting the decedent's mother to testify for the Commonwealth as to the decedent's statements to her on the telephone. The Supreme Court of Pennsylvania held that decedent's statements to her mother over the telephone were properly admitted in evidence as one of the "res gastae exceptions to the hearsay rule." However, one group of Justices thought the decedent's statements came in as "an exception to the hearsay rule for present sense impressions." The other was "satisfied" that the challenged statements were "admissible under the so-called 'excited utterance' exception, another variant of the res gestae exception." The consensus was that the indicia of reliability for such a declaration is its contemporaneousness with the observation of the occurrence or condition.

Hearsay testimony in Knight v. State, 338 So. 2d 201 (Fla. 1976) indicated that the defendant confronted

one Mr. Gans in his business parking lot and ordered him, at gunpoint, back into Gans's car. Defendant and Gans returned to the Gans home and picked up Mrs. Gans, whereupon defendant forced the two hostages to drive to a bank. Mr. Gans was instructed to go inside the bank and obtain $50,000 or Mrs. Gans, who remained in the car as hostage, would be killed. Mr. Gans entered the bank and related the situation to Mr. Gill, the bank president, who provided Gans with the money and promptly alerted the FBI and local authorities. Before the law enforcement officers could react, however, Mr. and Mrs. Gans were shot to death. At the defendant's trial for murder Mr. Gill's testimony recounting Mr. Gans's description of the kidnapping and extortion plot was admitted over objection. On defendant's appeal from his conviction of murder, the Supreme Court of Florida held that "[t]he testimony given by Mr. Gill was admissible as being within the res gestae of the crime of kidnapping.... The trial court properly held this evidence admissible as res gestae, an exception to the hearsay rule." *Id.* at 204.

The above cases support this Court's conclusion that the total content of Trooper Fisher's radio broadcasts, including defendant's alleged threats, were admiss ible under the "res gestae concept." Statements made by a deceased immediately prior to or during the course of a continuing criminal transaction are frequently admitted under this theory. *See generally,* 2 Wharton's Criminal Evidence § 297 (13th Ed. 1972); Annot., 74 A.L.R. 3d 963 (1976). However, admission of Fisher's radio communications, in their entirety, is also

supported by other formulations of certain other exceptions to the hearsay rule.

Trooper Fisher's radio reports to the Virginia State Police Control Station for the area through which he was traveling were made "in the regular course of business," and in the midst of the transaction he was reporting. As it was his duty to do, the trooper was informing his headquarters of an extraordinary situation which threatened the public safety, his life, and State property; he and his patrol car were under the control of a armed abductor who had possession of Fisher's weapon. The reasonable probability of the truthfulness of Fisher's report is obvious: (1) Common experience would reject the suggestion that a highway patrolman on duty would falsely report the loss of his service revolver and his forcible abduction. (2) In Virginia (as in North Carolina) to falsely report the commission of a crime with intent to mislead State authorities is a criminal offense. Va. Code § 18.2—461 (Replacement 1975). (3) The subsequent tragedy fully corroborated his report.

Fisher's oral dispatches were admissible for the same reason written entries in the regular course of business are admissible. State v. Cawthorne, 290 N.C. 639, 227 S.E. 2d 528 (1976); Geralds v. Champlin, 93 N.H. 151, 37 A.2d 155 (1944). *See* 1 Stansbury-s N.C. Evidence § 155 (Brandis rev. 1973); C. McCormick, Evidence §§307, 310 (2d Ed. 1978); 93 Univ. of Pa. L. Rev. 101 (1945). Of course, that portion of these dispatches which reported defendant's threat to kill

Fisher if anyone attempted to impede their progress to Atlanta is a classic example of "double hearsay." However, as stated in 2 Jones on Evidence §8.8 (6th Ed. 1927), "[T]here is no good reason why a hearsay declaration, which within itself contains a hearsay statement, should not be admissible to prove the truth of the included statement, if both the statement and the included statement meet the tests of an exception to the hearsay rule." *See* Yates v. Blair Transport, Inc., 249 F. Supp. 681, 688 (S.D.N.Y. 1965); 13 U.L.A., Uniform Rules of Evidence § 805 (West 1975). The dispatches challenged here meet this requirement. Had Fisher survived, upon a trial of defendant for kidnapping, or any other offense growing out of the events involved here, he could have testified to defendant's out-of-court statements which are now in question. They would have been competent against defendant either as admissions, a statement of his mental condition, or a declaration of intent. *See* Stansbury's North Carolina Evidence §§ 161, 162, 167 (Brandis rev. 1973).

For the reason set out above the verdict and judgment from which the defendant appeals are vacated and a new trial ordered.

New Trial.

CERTIFICATE OF SERVICE

I hereby certify that I am Assistant Attorney General for the State of North Carolina; that I have served copies of the within PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA by depositing copies of same in the United States Mail at Raleigh, North Carolina, first class postage paid, addressed to:

Hugh M. Currin
Attorney at Law
P.O. Box 147
Oxford, North Carolina 27565

John H. Pike
Attorney at Law
P.O. Box 632
Oxford, North Carolina 27565

This 6th day of October, 1978.

/s/ _____

DONALD W. STEPHENS
Assistant Attorney General

COUNSEL FOR THE STATE OF
NORTH CAROLINA, PETITIONER